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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

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CR-13-1659

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Tenia M. Crow

v.

State of Alabama

Appeal from Elmore Circuit Court  
(CC-13-419)

BURKE, Judge.

Tenia M. Crow pleaded guilty to child abuse, a violation of § 26-15-3, Ala. Code 1975. Crow was sentenced to imprisonment in the Alabama Department of Corrections for one year and one day, but the sentence was split, and she was

ordered to serve six months in the county jail followed by supervised probation.

Crow preserved for appellate review the issue of whether the trial court erroneously ruled, following a pretrial evidentiary hearing, that the seven-year-old victim, T.T., who was living with Crow, but who was not her biological child, would be deemed an unavailable witness for purposes of admitting T.T.'s out-of-court statements at trial because Crow allegedly had her sister, Tracy Gaddis, remove T.T. from the jurisdiction of the court before trial. See, §§ 15-25-31 and 15-25-32, Ala. Code 1975. (CR. 213, R. 82.) The circuit court's pretrial ruling would allow T.T.'s school nurse, his school guidance counselor, and his Department of Human Resources caseworker to testify regarding T.T.'s statements to them during their investigation of his alleged physical abuse.

Sections 15-25-31 and 15-25-32(2)a.2, Ala. Code 1975, allow for the admission of out-of-court statements from a child less than 12 years old when the defendant or someone acting on the defendant's behalf has intentionally removed the child from the court's jurisdiction. See § 15-25-32(2)a.2 ("[A] child is unavailable if the defendant or someone acting

on behalf of the defendant intentionally removes the child from the jurisdiction of the court.").

"The sufficiency of proof for establishing the predicate of unavailability is left to sound discretion of the trial court." Johnson v. State, 623 So. 2d 444, 447-48 (Ala. Crim. App. 1993); Matkins v. State, 521 So. 2d 1040, 1042 (Ala. Crim. App. 1987) ("The sufficiency of the proof of the predicate of unavailability of an absent witness is addressed to the sound discretion of the trial judge." (quoting Napier v. State, 377 So. 2d 1135, 1138 (Ala. Crim. App. 1979))). A trial court's ruling on whether a witness is unavailable to testify is given great deference and will be reversed only if there was an abuse of discretion. See, e.g., Flowers v. State, 799 So. 2d 966, 980 (Ala. Crim. App. 1991). Moreover, "[i]n an ore tenus proceeding, it is the duty of the trial court to resolve conflict in testimony and render judgment accordingly." Mester v. State, 755 So. 2d 66, 74 (Ala. Crim. App. 1999) (citations and quotations omitted). "Where the trial court resolves a factual issue on conflicting evidence, the reviewing court may not reverse it if there is any credible evidence to support the judgment." Id. at 74.

At the pretrial hearing conducted on the State's motion to have T.T. declared an unavailable witness, a generous amount of testimony was elicited regarding who had legal custody or care of T.T. and regarding Gaddis's knowledge of her responsibility to assure that T.T. attended court. However, regardless of custody or what instructions Gaddis allegedly received regarding T.T.'s attending court, the State's burden was to prove that Crow had Gaddis remove T.T. from the circuit court's jurisdiction.

The following facts were presented at the pretrial hearing regarding Crow's alleged intentional removal of T.T. from the circuit court's jurisdiction.

Elizabeth Dawson investigates alleged child-abuse cases for the Elmore County Department of Human Resources ("DHR"). She became involved in T.T.'s case on February 15, 2013, when she was contacted by T.T.'s school to investigate bruising on T.T. Following the accusations that Crow had whipped T.T., DHR placed T.T. with Crow's sister, Gaddis, as part of a DHR authorized "safety plan." (R. 16.)

Dawson testified that DHR did not "authorize[]" Ms. Gaddis to let the child leave the State because he might be summoned

to court." (R. 14.) According to Dawson, Gaddis "knew that if [T.T.] was expected to go to the court hearing that [Gaddis] would need to take him." (R. 14-15.) Dawson testified that she informed Gaddis

"that if the child were to be required to come to court that she would be responsible for getting him there ... because it is our understanding that the child was in her care at that point so it was her responsibility to make sure that, you know, he came to anything that he was required to come to at that time."

(R. 13.) Dawson learned in January 2014 that T.T. was in Texas and was not coming back to Alabama.

"[Gaddis] had advised [Dawson] that [Gaddis] had taken [T.T.] over the Christmas holidays to Texas to stay with her brother and there was no intentions of him coming back. [Dawson] had advised [Gaddis] that [Gaddis] knew that, you know, court was coming up and that he was supposed to be there. [Gaddis] advised that she had no idea that he was supposed to be at court in January."

(R. 15.)

Tyler Delashaw is a police investigator with the City of Millbrook. He testified and the record discloses, that on February 15, 2013, Crow gave a videotaped statement to the police in which she stated that she had whipped T.T. with a belt. At some point during Crow's interview, she was left alone in the interview room. The video recording remained on.

The video recording captured Crow making a telephone call to her sister, Gaddis. The video recording was played in open court. On direct examination Officer Delashaw testified that what he heard on the video recording was Crow saying to Gaddis, "I've got to get rid of [T.T.], got to get [T.T.] out of here." (R. 24, 25.) Officer Delashaw testified that T.T. was taken to Texas after this telephone call.

On cross-examination, Officer Delashaw stated that he did not know when T.T. was taken to Texas; he just knew he had been taken to Texas. The video recording was played again for Officer Delashaw. Officer Delashaw then testified that upon listening to the video recording again, what he heard on the videotape was "[Crow] stat[ing Gaddis] had to get [T.T.] out of here." (R. 26.) He then asserted "You know, we weren't sure what that meant," but "[Crow] said [Gaddis] had to get him out of here." (R. 26.) Defense counsel challenged Officer Delashaw, stating that counsel "did not hear that. If it is in there, I would like it on the Record. If it is not, I would like that on the Record." (R. 26.) The trial court did not respond, but the State asserted that the video recording would be provided for the court "to look at." (R.

27.) Upon continued questioning by the defense, Officer Delashaw acknowledged that the video recording did not disclose any instructions from Crow to take T.T. to Texas. Officer Delashaw conceded that he did not hear Crow "in this recording ever direct Ms. Gaddis to do anything with [T.T.]" (R. 27.) Defense counsel again asserted to the trial court that counsel did not hear on the video recording "[Crow] stat[ing Gaddis] had to get [T.T.] out of here" as Officer Delashaw had claimed he discerned from the video recording. (R. 26.) Counsel requested a transcript of the recording or, in the alternative, more time to review the recording "because that is not what was said" on the recording. (R. 28.) The trial court did not respond to counsel's request but instead told the State to call its next witness.

Gaddis testified that Crow, Gaddis, and T.T.'s father are siblings. T.T.'s father was in prison in Texas when the child-abuse charges were brought against Crow. Gaddis stated that Crow did telephone her during her interview with the police. Gaddis testified that Crow stated during that telephone call that "[Crow] has to do something with [T.T.], either [Gaddis has] to take [T.T.] because [T.T.] was trouble,

so I took [T.T.]" (R. 30.) Crow did not tell Gaddis "to do anything with the boy." (R. 38.) Based on that telephone call, Gaddis took control of T.T. on February 15, 2013. Gaddis testified that she had T.T. for about one year before leaving him in Texas with his father, who was released from prison in December 2013. Gaddis testified that contrary to Dawson's testimony, Gaddis was not informed that she would be responsible for bringing T.T. to court, nor was she informed not to take T.T. out of the state. Gaddis testified that she did not receive a subpoena at any time instructing her to bring T.T. to court.

Gaddis further testified that no one told her to take T.T. to Texas. Gaddis said that it was not unusual for her to take vacation in Texas because her children and grandchildren live there. She and T.T. went to and from Texas during the summer of 2013. Gaddis testified that when she returned to Texas in December 2013, it was to visit her children and grandchildren for Christmas. Gaddis testified that she had no intention of leaving T.T. in Texas until his father arrived and wanted the child. She testified:

"[T.T.'s father] was in prison at the time that DHR was involved, but he got out of prison during



Christmas. He was at the house, at my daughter's house during Christmas. That's when he said he wanted his child."

(R. 35.)

She stated that "I have no full custody. I had temporary custody. I had to give him his child." (R. 32-33.) Gaddis further explained:

"Every six months his mother had to write another temporary custody paper. What they gave me wasn't full custody. It was nothing I could do for [T.T.] with temporary custody. His parents wanted him back when I got to Texas."

(R. 33.) The trial court asked Gaddis what she meant by the above statement. She responded,

"It meant that in order for me to take care of my nephew, I would have to have full custody. I tried to get his Social Security card. Social Security office told me I did not have full custody of [T.T.] I tried to get like day care. They wanted to go by my income. In order for me to have -- to do the things I needed to do to help [T.T.], I had to have full custody which his parents wouldn't give me. When I went to Texas, I asked for full custody. My brother said I'm not fixing to give you full custody. Leave my child here. That's what I did. And this lady[, an assistant district attorney,] called me and asked me who I was. I told her my name was Tracy [Gaddis]. She asked me where was [T.T.] I said with h[er] brother. I told her that I was leaving [T.T.] in Texas with his father. She said okay. If she should have told me when I talked to her on at the phone that I had to bring [T.T.] back, I would have brought him back. But not once did she say that I had to bring [T.T.] back to

Alabama. I talked to her. I told her that I was leaving him in Texas."

(R. 33-34.) Gaddis further explained that she told the assistant district attorney ["the DA"] that T.T. was in the custody of his father living with their her brother Todd. She gave the DA Todd's telephone number. Gaddis testified that a few days after she left Texas she learned that

"[t]he DA called my brother Todd where [T.T.] and his dad was living with my brother Todd. She talked to Todd and asked Todd to bring him back. And he said that he didn't have any money, so she told him that she would postpone everything for six months. Maybe by then, he would have enough money to bring [T.T.] back to Alabama for court."

(R. 40-41.) Gaddis testified that the DA did not tell her to bring T.T. back from Texas. Gaddis testified that she did not talk to Crow about "any of this." (R. 43.)

Crow testified at the hearing. Crow testified that the State "don't know what they are talking about" when they claim the video recording discloses that she stated "we've got to get rid of [T.T.]" (R. 55.) She stated, "we all sat and listened to [the recording]. I didn't hear nothing that said you got to get rid of [T.T.] I didn't never say anything like that." (R. 55.) She testified that she telephoned her sister, Gaddis, from the police station and told her "you need

CR-13-1659

to come and get [T.T.], I can't take care of [T.T.], he's bad." (R. 52.)

"[T]he reason why I was saying that is because I knew they were going to take [T.T.] I didn't want [T.T.] to be in the system. So what I was meaning you need to come get [T.T.], not to come get [T.T.] and take him to Texas. That didn't even come to my mind."

(R. 52.) Crow testified that she did not direct anyone to do anything with T.T.

"Why would I tell [Gaddis] to take [T.T.] out [to] Texas. I wasn't indicted. I didn't know I was being arrested. I wasn't arrested until when, July? I was told by DHR that the case had been dropped. So why would I tell [Gaddis] to take [T.T.] to Texas anyway. Common sense will let you know I wasn't indicted. I wasn't arrested."

(R. 56.)

"[W]hat I'm saying is that my sister had to come and get my nephew because I knew they were going -- I didn't want him into the system. That's all that was."

(R. 57.)

T.T. was first subpoenaed on September 23, 2013, to appear in court for trial on October 7, 2013. (R. 5.) Crow testified as follows regarding subpoenas:

"First time I got a subpoena for [T.T.], first time I came to court. That was like a year -- the first time I got a subpoena for [T.T.], I told [Gaddis] about that. [T.T.] was still here in

Alabama when I got the first subpoena. Now any other subpoenas, I did not receive any of that.

"....

"I got a subpoena at the beginning, but I didn't get a subpoena for him to be in court today. No, I did not."

(R. 58-59.) Crow reiterated that when she received a subpoena for an earlier court appearance she told Gaddis and Gaddis brought T.T. to court. Crow reasserted that she did not receive a subpoena for the instant court date.

"A. I told [Gaddis] that I got a subpoena for [T.T.] to be in court and [T.T.] was here.

"Q. And now [T.T.] is not here?

"A. I did not get a subpoena for [T.T.] to be here."

(R. 60.)

"Q. The subpoena you got, did you say February?

"A. It was the first subpoena, first time we ever came to court. I can't remember when, but it was the first subpoena. I'm going, why would they subpoena [T.T.] at my house. [T.T.] is not here. So I called [Gaddis] and I said, [Gaddis], [T.T.] got a subpoena for him to be in court. She said, okay, I said, make sure he's there. She said, okay.

"Q. Was he here?

"A. He was here, yes, sir.

"Q. That was the last subpoena you ever got?

"A. Yes, sir.

"Q. Did you feel it was your responsibility to ensure that [T.T.] was here today?

"A. No. It's not my responsibility. It was [Gaddis's] responsibility or whoever. All I know is that [Gaddis] took [T.T.] -- she said -- when she came back from Texas, I said, [Gaddis], where is [T.T.]? She goes, well, [the father] said he wanted his son and wouldn't give me full custody. I said -- She said, I can't bring him back. It would be like kidnapping. So I didn't have nothing to do with it. Had nothing to do with it. I know I had to go to court and [T.T.] is not here, so.

"Q. When you had control over the matter, you did try to ensure he was here by telling [Gaddis]?

"A. When I received the subpoena, I told [Gaddis] I received a subpoena for [T.T.] to be in court and [T.T.] was here.

"Q. That was the last subpoena you ever got?

"A. That's the last one.

"MR. BUSH [defense attorney]: That's all I have."

(R. 61-62.) Crow further testified that she knew Gaddis had taken T.T. to Texas and back two or three times during the year he lived with Gaddis. Crow stated that after signing the DHR's paper giving her rights over T.T. to Gaddis, Crow was prohibited from seeing him alone and had no more "say" over T.T. (R. 53.) She further stated that she had never been in trouble before and that she did everything that DHR asked her

CR-13-1659

to do. Crow asserted that she had nothing to do with T.T.'s failure to attend court.

Following the pretrial hearing conducted on June 16, 2014, the circuit court entered the following two written orders finding T.T. to be an unavailable witness.

"Case called. [Crow present with counsel, Hon. Peter Bush. Hearing on the State's Notice of Intent to Declare the Victim Unavailable. Witnesses' testimony taken. Exhibits accepted. Court determines that the victim, [T.T.] is unavailable for trial on Thursday, June 19, 2014.

"DONE this 16th day of June, 2014."

(CR. 179.)

"Case called and testimony being taken on the issue of the availability of the victim as a witness. Court determining that the under 12 years of age witness is unavailable and was transported to Texas by the Safety Plan custodian, Tracy Gaddis.

"This Court is to inform the jury that the out of Court statement by the witness/victim was taken without the Defendant being afforded an opportunity to cross examine the out [sic] court. Additionally, the Court will advise the jury that it has conducted a trustworthiness hearing before admitting the out of Court testimony.

"DONE this 17th day of June, 2014."

(CR. 182.) On June 18, 2014, Crow filed a motion asking the circuit court to alter, amend, or vacate its June 16, 2014, order. Before the trial was scheduled to begin on June 19,

2014, Crow was allowed to present arguments in support of the motion, after which the motion was denied.

As previously stated, the State had the burden of proving that Crow directed Gaddis to remove T.T. from the circuit court's jurisdiction.

We first note that, in the present case, although the record indicates that the video recording was played in open court twice, the video recording itself was not entered into evidence and, thus, was not made a part of the record on appeal. "An appellate court may only consider the facts contained in the record on appeal, and it may not presume any facts not shown by that record and make them a ground for reversal." Carden v. State, 621 So. 2d 342, 346-47 (Ala. Crim. App. 1992). "[T]his Court cannot predicate error on matters not shown by the record, nor can we presume error from a silent record." Owens v. State, 597 So. 2d 734, 736 (Ala. Crim. App. 1992). "Where the record is silent on appeal, it will be presumed that what ought to have been done was not only done, but rightly done." Id., quoting Jolly v. State, 405 So. 2d 76 (Ala. Crim. App. 1981).

The testimony at the hearing was that, on February 15, 2013, T.T. went to school with visible bruises, and also on February 15, 2013, the police recorded an interview with Crow. During a break in the questioning, Crow telephoned her sister, Gaddis, who had taken custody of T.T. pursuant to a DHR "special care" order on February 15, 2013. A video recording of the telephone conversation was played in open court twice. Officer Delashaw testified regarding the statements he heard on the video recording. Although Officer Delashaw conceded that he did not hear Crow specifically direct Gaddis to remove T.T. from the court's jurisdiction and that he was not sure what Crow's statement actually meant, Officer Delashaw maintained that he had heard Crow say that Gaddis "had to get [T.T.] out of here." (R. 26.) Therefore, there was testimony presented that would support a finding that Crow had directed Gaddis to remove T.T. from the court's jurisdiction.

Although Crow is correct in her assertion that there was conflicting evidence presented at the hearing, it was the duty of the circuit court to resolve conflicts in the evidence, and this Court may not reverse the trial court's determination if there is any credible evidence to support the judgment. See



Mester, 755 So. 2d at 74. As stated earlier, we must give great deference to the circuit court's ruling on the unavailability of a witness. See Flowers, 799 So. 2d at 980. Accordingly, because there was testimony from Officer Delashaw about Crow's statements to Gaddis and because the circuit judge had the opportunity to hear the video recording himself, we cannot say that the circuit court abused its discretion in determining that Crow directed Gaddis to remove T.T. from the court's jurisdiction.

Based on the foregoing, the judgment of the circuit court is due to be affirmed.

AFFIRMED.

Windom, P.J., and Joiner, J., concur. Welch, J., dissents, with opinion. Kellum, J., joins in dissent.

WELCH, Judge, dissenting.

I respectfully dissent. I believe that the majority has erred by upholding the trial court's order granting the State's pretrial motion asking the court to find T.T. to be an unavailable witness. I do not believe that the State met its burden of proving that Tenia M. Crow intentionally had T.T. removed from the circuit court's jurisdiction.

I agree with those facts set forth in the majority opinion. I would supplement those facts with the following.

Crow, Tracy Gaddis, T.T.'s father, and Todd T., are siblings. At the time of the incident T.T.'s father was in prison in Texas and his mother was unable to care for T.T.; therefore, T.T. lived with Crow, his paternal aunt. On February 15, 2013, T.T. went to school with visible bruises believed to have been inflicted by Crow. Later that same day, the police video-recorded an interview with Crow concerning T.T.'s bruises.<sup>1</sup> During a break in the questioning Crow telephoned Gaddis, and according to the State, told Gaddis to

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<sup>1</sup>The prosecution referenced Crow's July recorded interview, but the record discloses that Crow's interview with the police was recorded on February 15, 2013, the day the incident was reported.

get rid of T.T. According to the State, the inference to be taken from this comment was that Crow was instructing Gaddis to remove T.T. from the circuit court's jurisdiction so that he could not testify against Crow, and, in compliance, Gaddis took T.T. to Texas and left him there. Also, on February 15, 2013, pursuant to a Department of Human Resources ("DHR") "special care" order, Gaddis took custody of T.T. However, as best I can discern from the record, legal custody of T.T. remained at all times with his mother and father.

Crow was indicted on July 12, 2013, and was arrested on July 24, 2013. Gaddis testified that she took T.T. to Texas at some point in the summer of 2013 for her summer break, after which they returned to Alabama. Crow, the defendant charged with abusing T.T., testified that on September 23, 2013, she found a subpoena for T.T. taped to her front door. Crow stated that she telephoned Gaddis and told her to have T.T. in court for the scheduled October 7, 2013, trial. Gaddis testified that she learned of the October 2013 court date from Crow and took T.T. to court that day. In fact, Gaddis testified that she never received a subpoena for T.T. to appear at any of the scheduled court dates. There was no

dispute that Gaddis and T.T. appeared in court on October 7, 2013, for Crow's trial. However, the trial was continued.

Gaddis testified that she and her family, including T.T., went to see her children in Texas in December 2013 for Christmas. At that time, T.T.'s father, who had been recently released from a Texas prison, took T.T. from Gaddis, and T.T. and his father remained in Texas with Todd.

Crow's trial was rescheduled for January 13, 2014. The case-action summary reflects that an attempt to serve a subpoena on T.T. on January 6, 2014, was returned with the notation "no service." Regarding the continuance of this trial date, Gaddis testified that no one told her that T.T. was supposed to attend court in January. She said that if she had known, she would have brought T.T. back to Alabama with her. Gaddis further testified that while she was still in Texas in December 2013, she spoke with a lady from the district attorney's office and she told the lady that she was leaving T.T. in Texas in the legal custody of his parents<sup>2</sup> and that the lady said "okay." (R. 35, 40.) Nevertheless, Gaddis

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<sup>2</sup>It is unclear if by "parents" Gaddis meant T.T.'s father or if she meant his mother and father.

stated that she gave the assistant district attorney ("DA") her brother Todd's telephone number and that she was later told that the assistant DA had spoken over the telephone with Todd and that the assistant DA had agreed to postpone the January trial for six months in order to provide Todd time to save money to travel with T.T. to Alabama for trial.

The trial was rescheduled to begin on June 16, 2014. On June 9, 2014, there was a "no service" notation on a subpoena issued for T.T. -- again at Crow's address.<sup>3</sup> The hearing on the State's motion to find T.T. unavailable was held on June 16, 2014. A guilty plea was entered on June 19, 2014.

If the circuit court believed that Crow could be heard on the video-recording instructing Gaddis to "get rid" of T.T., the State still failed to prove that Crow was guilty of intentionally removing or having someone else remove T.T. from the court's jurisdiction on the day the trial was to commence. The undisputed testimony was that Gaddis brought T.T. to the

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<sup>3</sup>This subpoena is in the record; it reflects that the attempt to serve this subpoena was made at --- Foxdale Road, Millbrook. This is the address listed as Crow's address on several documents in the record. Gaddis's subpoena was served at --- West Wareingwood Drive, Montgomery. Thus, it does not appear that the subpoenas for T.T. were served at Gaddis's residence.

October 2013 trial setting and that she did so because Crow telephoned her and told her to do so. In December 2013 T.T.'s father took the child. There was no testimony whatsoever suggesting that Crow played any part in T.T.'s failure to be present at the June 2014 trial date.

Moreover, the idea that Crow allegedly told Gaddis to "get rid" of T.T. came from the prosecutor who asserted that he discerned from the video recording Crow telling her sister to "get rid" of T.T. The prosecutor's assertion is not evidence in the case. Moreover the assertion was contradicted by State witness Officer Tyler Delashaw, who testified that Crow did not "in this recording ever direct Ms. Gaddis to do anything with [T.T.]" (R. 27.) Officer Delashaw testified that Crow stated that "[Gaddis] had to get [T.T.] out of here." (R. 26.) He then testified that, "You know, we weren't sure what ['get [T.T.] out of here'] ... meant." (R. 26.) Crow and Gaddis testified that Crow telephoned Gaddis to come get T.T. to prevent DHR from placing T.T. in its "system." In my opinion, the record does not disclose any testimony that conflicts with Crow's or Gaddis's testimony in this regard. Further, in my opinion, the comment "get T.T.

out of here" is vastly less culpable than the comment "get rid of T.T." In this regard, the circuit court, which watched and listened to the video-recording, did not enter any findings regarding what the video-recording disclosed. The only finding made by the circuit court was that T.T. was unavailable because he had been "transported to Texas by the Safety Plan custodian, Tracy Gaddis."<sup>4</sup> (CR. 182.) This finding was consistent with Gaddis's testimony and is not evidence of Crow's guilt.

Therefore, I believe that the circuit court erred in its pretrial ruling that T.T. was an unavailable witness, thus finding that the State would be allowed to introduce T.T.'s out-of-court statements at the impending trial. I would reverse Crow's guilty-plea conviction for child abuse and remand this cause to the circuit court for further proceedings. Therefore, I dissent.

Kellum, J., concurs.

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<sup>4</sup>There was conflicting evidence regarding whether Gaddis disobeyed instructions from DHR informing her that she would be responsible for bringing T.T. to court and that she was not to take T.T. out of Alabama, but this testimony was not necessary to the resolution of the issue whether Crow was responsible for T.T.'s absence.